

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF: ROBERT NESS Section 21, Twelve Mile Lake Township Emmet County	ADMINISTRATIVE CONSENT ORDER NO. 2007-AFO- 24
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TO: Robert Ness
3620 250th Street
Estherville, Iowa 51334

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Robert Ness for the purpose of resolving the issues surrounding a manure discharge at Mr. Ness's facility. The parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Tom Roos, Field Office #3
Iowa Department of Natural Resources
1900 N. Grand; Gateway North, Suite E17
Spencer, Iowa 51301
Phone: 712/262-4177

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Urbandale, Iowa 50322
Phone: 515/281-8563

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part 1 or Iowa Code chapter 459A, and the rules adopted or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

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III. STATEMENT OF FACTS

1. Robert Ness owns and operates a group of open cattle feedlots located in Section 21 of Twelve Mile Lake Township in Emmet County, Iowa. The open lots have a capacity of approximately 500 head. The facility is located along the southeast side of Twelve Mile Lake. Twelve Mile Lake is a shallow 442 acre lake owned and managed by the State of Iowa.

2. On March 13, 2007, the Clay County NRCS contacted DNR Field Office #3 regarding a complaint alleging that manure from a feedlot was entering Twelve Mile Lake. Tom Roos, DNR Field Office #3 environmental specialist, investigated the complaint.

a. Mr. Roos arrived at Twelve Mile Lake and noted a small trickle of manure and ice melt flowing from Mr. Ness's west feedlot down to a pool of water that had accumulated in a pasture. The pool of water was overflowing to the lake. Mr. Roos conducted field tests and collected laboratory samples of the water running into the lake. Samples from this location are referenced as Site #1. Mr. Roos noted the water in this area was slightly turbid, but did not have a manure odor.

b. Mr. Roos then proceeded to Mr. Ness's residence and explained to Mr. Ness that there had been a complaint regarding manure runoff from his feedlots. Mr. Ness and Mr. Roos walked around to check the lake for any other discharge points where manure could be entering the lake. To the west of Mr. Ness's residence there was a heavy manure flow from two of Mr. Ness's feedlots entering the lake. Mr. Roos noted there was a heavy accumulation of manure sitting on top of the ice, as well as manure running into the lake under the ice. The liquid entering the lake had a very dark color and a strong manure odor. Mr. Roos conducted field tests and collected laboratory samples of the water in this area. Samples from this location are referenced as Site #2.

c. Mr. Roos also looked at a site east of Mr. Ness's residence. Mr. Roos noted the flow entering the lake at this point to be feedlot runoff mixed with tile water. The water in this area was dark brown in color and had a manure odor. Mr. Roos conducted field tests and collected laboratory samples of the water in this area. Samples from this location are referenced as Site #3.

The field test results from the sites were as follows:

Location	Ammonia (mg/L)	Dissolved Oxygen (mg/L)	pH	Temperature (°C)
Site #1	7.5	9.0	7.8	3
Site #2	*	*	7.5	4
Site #3	10.0	7.5	7.5	2

*Ammonia and Dissolved Solids were unable to be determined due to the color of the water

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The laboratory tests were as follows:

Location	Ammonia Nitrogen (mg/L)	Fecal Coliform (Col/100mL)	Biochemical Oxygen Demand (mg/L)	Total Suspended Solids (mg/L)
Site #1	8.6	*	50	35
Site #2	150	960,000	1,900	2,000
Site #3	19	200,000	230	560

*Laboratory sample was not analyzed from this site due to a broken sample bottle.

3. Following the inspection, Mr. Roos met with Mr. Ness to determine how the manure flow from the west feedlots could be diverted or slowed. Mr. Ness stated he had several old round bails he could use to block off the manure flow.

4. On April 9, 2007, a Notice of Violation letter was issued to Mr. Ness for the water quality violations caused by the manure discharge from his facility. The letter included a copy of the inspection report. Mr. Ness was informed the matter was being referred for formal enforcement.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 459A.401(1) and 567 IAC 65.101(1) require the minimum level of manure control for any open feedlot shall be the removal of settleable solids from the manure prior to discharge into a water of the state. Mr. Roos observed manure solids from Mr. Ness's feedlots in Twelve Mile Lake. The above-noted facts indicate a violation of these provisions.

2. 567 IAC 61.3(2)"b" provides general water quality criteria and states all surface waters shall be free from floating debris, oil, grease, scum and other floating materials attributable to wastewater discharges or agricultural practices in amounts sufficient to create a nuisance. Manure runoff from Mr. Ness's feedlots flowed into Twelve Mile Lake causing scum and floating debris in the lake. The above-facts disclose a violation of this provision.

3. 567 IAC 61.3(2)"c" provides general water quality criteria and states all surface waters shall be free from substances attributable to wastewater discharges or agricultural practices producing objectionable color, odor or other aesthetically objectionable conditions. Manure runoff from Mr. Ness's feedlots flowed into Twelve Mile Lake creating objectionable color and odor. The above-facts disclose a violation of this provision.

4. Iowa Code section 455B.186 prohibits the discharge of pollutants into water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. Iowa Code section 455B.186 further prohibits the discharge of pollutants, treated or untreated, into any state-owned natural or artificial lake. Mr. Roos found evidence of a

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manure discharge from Mr. Ness's feedlots into waters of the state. The above-facts indicate a violation of this provision.

V. ORDER

THEREFORE, it is hereby ordered and Mr. Ness agrees to do the following:

1. Mr. Ness shall submit and implement a Plan of Action for the construction of manure containment structures within 90 days to DNR Field Office 3; and
2. Mr. Ness shall pay a penalty of \$3,000.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

1. Iowa Code section 459A.502 and Iowa Code section 455B.191 authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.
2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty. The administrative penalty assessed by this administrative consent order is \$3,000.00. The administrative penalty is determined in accordance with the following:

Economic Benefit – Failure to properly contain all manure has allowed Mr. Ness to save time and money. By failing to install adequate manure storage structures, Mr. Ness has gained an economic benefit of at least \$500.00. Therefore, \$500.00 is assessed for this factor.

Gravity of the Violation – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. The manure discharge resulted in the degradation of the water quality of a state owned water body. The water quality violations threaten the integrity of the water quality program. Based on the above considerations, \$1,250.00 is assessed for this factor.

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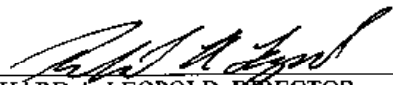
Culpability – Mr. Ness has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that his conduct is subject to DNR's rules. Mr. Ness failed to have the proper manure controls in place. Based on the above considerations, \$1,250.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Robert Ness. For that reason, Robert Ness waives his right to appeal this order or any part thereof.

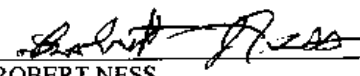
VIII. NONCOMPLIANCE

Failure to comply with this order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order. DNR reserves the right to bring enforcement action, including penalties, or to request that the attorney general initiate legal action to address other violations not described in Section "IV. Conclusions of Law" of this administrative consent order but which may arise from the facts summarized in Section "III. Statement of Facts" of this administrative consent order. DNR specifically reserves the right to pursue enforcement action, including penalties, for any current violations not specifically cited in this order.



RICHARD A. LEOPOLD, DIRECTOR
Iowa Department of Natural Resources

Dated this 2 day of
July, 2007.



ROBERT NESS

Dated this _____ day of
_____, 2007.

No #: Kelli Book; Tom Roos; Kenneth Hessenius; Gene Tinker; EPA; VIII.D.1.b, VIII.D.3.a